

PCS 2000 could have refused to pay the forfeiture and forced the Commission to refer the case to the Attorney General to institute a civil suit in a district court. See 47 U.S.C. § 503(b)(3)(B). The suit for recovery of the forfeiture would have been a trial de novo, see 47 U.S.C. § 504(a), in which the Commission's findings and conclusions would have carried no weight whatsoever, see *United States v. Summa Corp.*, 447 F.Supp. 923, 925 (D. Nev. 1978). However, PCS 2000 paid the forfeiture, thereby waiving its right to a trial de novo and allowing the order to become final and unappealable. ^{7/}

Because the Commission elected to pursue a summary enforcement proceeding against PCS 2000, there was never a conclusive determination, based on an evidentiary record, that Mr. Easton committed any intentional misconduct. Certainly, the Commission's untested conclusion that Mr. Easton acted "willfully" for the purposes of the forfeiture does not mean that he acted intentionally. See *PCS 2000 NAL*, 12 FCC Rcd at 1718. Regardless, Mr. Easton had been given no opportunity to adjudicate the issue of whether he had acted inten-

^{7/} The Commission had the authority to initiate a forfeiture proceeding against Mr. Easton. See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a). Because Mr. Easton was not a licensee, the Commission was required (1) to send him a citation giving notice of the alleged violations, and (2) to give him an opportunity for a personal interview with a Commission official. See 47 U.S.C. § 503(b)(5); 47 C.F.R. § 1.80(d). Mr. Easton would have been liable for a forfeiture only if he "subsequently engaged in the conduct described in such citation." 47 U.S.C. § 503(b)(5); 47 C.F.R. § 1.80(d). The Commission did not pursue that process against Mr. Easton, and the one-year statute of limitation has run on his alleged intentional deceptions. See 47 U.S.C. § 503(b)(6)(B); 47 C.F.R. § 1.80(c)(3).

tionally or to otherwise challenge the outcome of the Commission's investigation. That constituted a patent violation of due process, because Mr. Easton was entitled to "some kind of hearing", e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), in which to clear his name.

V. The Commission Should Remedy
 Its Due Process Violation

The Commission's "determination" that Mr. Easton was guilty of serious misrepresentations rests entirely on its investigation. However, an investigation is not an adjudication. And "[n]o matter how elaborate, an investigation does not replace a hearing" for the purposes of due process. *Winegar*, 20 F.3d at 901.

An administrative investigation "discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding" *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1388 (5th Cir. 1971). An investigation does not implicate due process rights because "it adjudicates no legal rights", *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984), and does not "determine guilt or innocence", *Genuine Parts*, 445 F.2d at 1388. The Commission certainly recognizes that distinction. It has held that the purpose of an investigatory proceeding "is not to make a 'final disposition' or adjudicate the rights of any person, but simply to ascertain the facts." *Southern Bell Tel. & Tel. Co.*, 70 FCC 2d 705, 707 (1979).

The Commission's investigation was not an adjudication which could result in a final determination as to whether Mr. Easton

engaged in intentional misconduct. Certainly, he was not a "party" to the investigation. See *Inquiry into Alleged Abuses of the Commission's Processes by Applicants for Licensees in the Interactive Voice and Data Systems*, 9 FCC Rcd 6432, 6432 (1994); *Southern Bell*, 70 FCC 2d at 707. ^{8/} Thus, the Commission's investigative finding as to his conduct cannot have any preclusive effect under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). See generally *Barry Skidelsky*, 7 FCC Rcd 1392, 1393 (Rev. Bd. 1992). Mr. Easton would be subject to the doctrines only if the Commission had been acting in a judicial capacity, see *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991), and, as a party to a proceeding, he had been given a "fair opportunity procedurally, substantively and evidentially" to litigate the issue of his alleged misconduct, see *State of North Carolina v. Chas. Pfizer & Co., Inc.*, 537 F.2d 67, 73 (4th Cir.), cert. denied, 429 U.S. 870 (1976). None of those factors were present when the Commission issued its *PCS 2000 NAL*.

Mr. Easton cannot escape entirely from the stigma cast by the Commission's investigation. However, the Commission could give him some relief and partly remedy its due process violation. It should prevent further collateral injury to Mr. Easton by modifying the *Order* to include an explicit acknowledgement that there has been no adjudicative determination that he engaged in intentional misconduct. The Commission has the authority to grant Mr. Easton that

^{8/} Mr. Easton made himself available to be interviewed by the Bureau investigators. However, he was never interviewed.

limited relief. See 47 U.S.C. § 416(b).

Conclusion

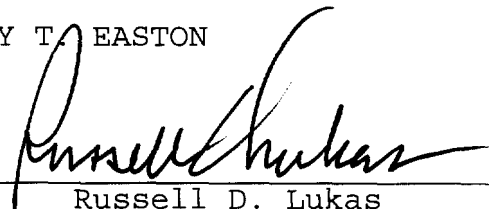
The Commission has long recognized its duty to perform its investigatory and adjudicatory functions in a manner consistent with "traditional notions of fairness and impartiality". *Redwood Microwave Association, Inc.*, 61 FCC 2d 442, 448 (1976). However, fairness and impartiality played no role in the Commission's decision-making in the aftermath of PCS 2000's mistaken \$180 million bid. In order to accommodate PCS 2000 and receive its auction payments, the Commission departed from lawful procedure, exceeded its jurisdiction, and trampled on Mr. Easton's due process rights. Now that the process has become irrevocably tainted with the appearance of bias, the Commission should vacate its show cause order and abandon its unfair and unwarranted pursuit of Mr. Easton.

For all the foregoing reasons, the Commission should vacate its show cause order and modify the *Order* as requested herein.

Respectfully submitted,

ANTHONY T. EASTON

By



Russell D. Lukas
Thomas Gutierrez
George L. Lyon, Jr.

His Attorneys

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October 6, 1997



Federal Communications Commission
Washington, D.C. 20554

September 22, 1997

Attachment A

97 SEP 24 AM 9:55
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In Reply Refer To:
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BY FEDERAL EXPRESS

Court Clerk
Superior Court of the State of California, County of San Mateo
401 Marshall Street
Redwood City, CA 94063

Re: Anthony T. Easton v. Cynthia Hamilton
Case No. 399327

Dear Sir or Madam:

This letter is to inform you that the Federal Communications Commission has commenced a formal enforcement proceeding against Mr. Anthony T. Easton based on his involvement in matters concerning a January 23, 1996, bid placed by PCS 2000, L.P. (PCS 2000), an applicant for a radio communications license, in a radio spectrum auction held by the Federal Communications Commission. A copy of the Order initiating the enforcement proceeding against Mr. Easton is attached. See *Westel Somoa, Inc.*, WT Docket No. 97-199 (September 9, 1997). On January 23, 1997, Mr. Easton, a former officer and director of PCS 2000, filed a defamation action in this Court against an individual defendant, Ms. Cynthia Hamilton, based, in large part, on the same matters that are the subject of the Commission's enforcement proceeding.

The Commission has made the preliminary determination that Mr. Easton misrepresented facts to the Commission regarding the January 23, 1996 bid by PCS 2000. Mr. Easton's misrepresentations formed the basis of a January 22, 1997 Order imposing a \$1,000,000 forfeiture against PCS 2000. (See attached Notice of Apparent Liability for Forfeiture, *PCS 2000, L.P.*, 12 FCC Rcd 1703 (January 22, 1997).) The purpose of the subsequent enforcement proceeding against Mr. Easton individually, which was initiated on September 9, 1997, is to determine whether Mr. Easton should be barred from holding any Commission license and/or participating in any future Commission auction as a result of the misrepresentations he made before this Commission. Because of the Commission's ongoing proceeding, we respectfully request that the captioned proceeding be stayed or, in the alternative, discovery directed against Ms. Hamilton be stayed, pending a resolution by the Commission on these matters.

Ms. Hamilton, the defendant in the above-captioned proceeding, will be a key witness

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in our proceeding against Mr. Easton. The Commission is greatly concerned that this civil proceeding may have been initiated solely to harass or otherwise intimidate Ms. Hamilton. This concern is evidenced, in part, by the fact that Mr. Easton's counsel previously prepared a report which includes facts and allegations concerning Ms. Hamilton's personal background, which was distributed throughout the PCS 2000 membership totaling more than 1600 individuals. We believe that in order for us to fully examine the circumstances surrounding the misrepresentations made by Mr. Easton, we need to have testimony from Ms. Hamilton and other witnesses free of potentially obstructive influences. Accordingly, we respectfully request a stay of this civil proceeding to allow us to utilize Ms. Hamilton as a witness without her testimony being compromised or tainted by the proceeding before this Court.

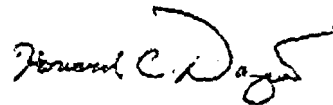
Similarly, the Commission is concerned that other potential witnesses who observed Mr. Easton's actions on January 23, 1996, will be reluctant to candidly testify before the Commission in our proceeding against Mr. Easton while the civil proceeding before this Court is pending. We are concerned that other witnesses may fear becoming the subject of a similar lawsuit by Mr. Easton if they decide to testify against him. Therefore, we believe that a stay is necessary in order to maintain an environment in which Mr. Easton may pursue his legal remedies and all witnesses feel free to cooperate fully and candidly with the Commission without fear of retaliation.

Finally, the Commission is concerned that if full discovery is allowed in this civil proceeding, it could potentially interfere with the availability of witnesses in the Commission's proceeding. Because this civil proceeding and the Commission's proceeding both focus primarily on Mr. Easton's actions on, and subsequent to, the January 23, 1996, PCS 2000 auction bid, it is inevitable that both inquiries will involve the same witnesses. Accordingly, to ensure that witnesses are available during the period in which the Commission concludes its investigation, we respectfully request that the civil action be stayed or, at a minimum, all discovery directed at Ms. Hamilton be stayed. Given that Mr. Easton will have a full opportunity to examine relevant witnesses, including Ms. Hamilton, in connection with the proceeding pending before the Commission, Mr. Easton will suffer no apparent prejudice from a stay of discovery in the California state action.

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We note that the Commission's hearing of this matter is scheduled to commence on January 13, 1998. We will immediately inform the Court upon conclusion of the Commission's proceeding in order that the California state court proceeding may timely resume.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard C. Davenport". The signature is fluid and cursive, with a large, stylized initial "H" and "D".

Howard C. Davenport
Chief, Enforcement and Consumer
Information Division
Wireless Telecommunications Bureau
Federal Communications Commission

cc: James Wheaton, Esq. (Counsel for C. Hamilton)
Adrian Driscoll, Esq. (Counsel for A. Easton)

CERTIFICATE OF SERVICE

I, Katherine A. Baer, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 6th day of October, 1997, has had copies of the foregoing PETITION FOR RECONSIDERATION hand-delivered to the following:

Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
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Katherine A. Baer